(4)

No. 99-1852

Supreme Court, U.S.
FILED
JUN 19 2000
CLERK

In The
Supreme Court of The United States

ROBERT B. SKLAROFF, M.D.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA BY MICHAEL FISHER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, et al.,

Respondents.

On Petition for Writ of Certiorari
From The Supreme Court of Pennsylvania

RESPONDENT COMMONWEALTH OF PENNSYLVANIA'S BRIEF IN OPPOSITION

Reeder F. Fox
(Counsel of Record)
Mark Lipowicz
Frank E. Noyes, II
Duane, Morris & Heckscher LLP
One Liberty Place
Philadelphia, PA 19103
(215) 979-1000

Thomas L. VanKirk
Stanley Yorsz
Buchanan Ingersoll PC

D. Michael Fisher
Attorney General
of Pennsylvania

Joel M. Ressler
Senior Deputy Attorney General

Louis J. Rovelli
Executive Deputy Attorney General

14PP

QUESTIONS PRESENTED

1. Where the decisions of the Philadelphia Court of Common Pleas of Philadelphia and the Commonwealth Court of Pennsylvania *en banc*, denying the non-party Petitioner's attempt to intervene in this case post-settlement, were based strictly on adequate and independent state grounds, i.e., applying settled Pennsylvania law that Petitioner had no standing to intervene and failed to satisfy the requirements for intervention -- and no federal issues were raised in or decided by either court -- does this Court have jurisdiction to review those decisions?

2. Where the trial court denied Petitioner's post-settlement Petition to Intervene, finding: that Petitioner had no standing to intervene; that his claims were speculative and not ripe; that he did not have any legally enforceable interest that would justify intervention under Pa. R. C. P. 2327; and that intervention would unduly prejudice the resolution of the litigation and the parties under Pa. R.C. P. 2329; and where the decision was affirmed and adopted in its entirety by the Commonwealth Court of Pennsylvania *en banc*, which also denied reconsideration *en banc*, and further review was denied by the Supreme Court of Pennsylvania, is there any basis for this Court to engage in further review under the abuse of discretion standard governing non-party intervention under Pennsylvania law?

3. Where Petitioner failed to satisfy any of the prerequisites for non-party intervention under Pennsylvania law, has received full consideration and review by the Pennsylvania trial and appellate courts, and has not established or even raised any of the considerations in Supreme Court Rule 10 for granting a Writ of Certiorari, should this Court undertake further review?

4. Where Pennsylvania law renders petitions to intervene moot once the underlying lawsuit is terminated such that there is no longer any case or controversy in which to intervene, and this lawsuit was dismissed with prejudice on January 13, 1999, in conjunction with the parties' settlement of the case, is there any justiciable issue remaining for this Court to review?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

A. COUNTER-STATEMENT OF BASIS FOR JURISDICTION 1

B. COUNTER-STATEMENT OF THE CASE 1

C. REASONS TO DENY THE PETITION 4

1. The Case Was Decided On Adequate and Independent State Grounds, and This Court Therefore Has No Jurisdiction to Hear the Case 5

2. The Petition for Review Should Be Dismissed as Moot Because There No Longer Is any Case or Controversy in Which to Intervene 5

3. As Found After Full Review by the Pennsylvania Appellate Courts, Petitioner Asserts No Basis To Question the Sound Discretion of the Trial Court 6

4. The Petition Contains Numerous Misstatements of the Tobacco Settlement and the Course of This Appeal 8

D. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Cytemp Specialty Steel Div., Cyclops Corp. v. Pennsylvania Public Utility Comm'n, 128 Pa. Commw. 349, 563 A.2d 593 (1989) 6

DeFunis v. Odegaard, 416 U.S. 312 (1973) 6

Michigan v. Long, 463 U.S. 1032 (1983) 4, 5

Pennsylvania Association of Rural and Small Schools v. Casey, 31 Pa. 439, 613 A.2d 1198 (1992) 7

Pennsylvania Coal Mining Assoc. v. Commonwealth of Pennsylvania, 498 Pa. 1, 444 A.2d 637 (1982) 6

Richards v. Trimbur, 374 Pa. Super. 352, 543 A.2d 116 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989) 4, 6

Robert B. Sklaroff M.D. v. Allegheny Health Education Research Foundation, et al., 1996 W.L. 665519 (E.D. Pa. Nov. 12, 1996), *aff'd without opinion*, 118 F.3d 1578 (3d Cir. 1997) 3

Robert B. Sklaroff M.D. v. Allegheny Health Education Research Foundation, et al., 1998 W.L. 47376 (E.D. Pa. Feb. 3, 1998) 3

Procedural Rules

Pa. R.C.P. 2327 ..... 3, 7

Pa. R.C.P. 2329 ..... 3, 7

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A. COUNTER-STATEMENT OF BASIS FOR JURISDICTION

There is no basis for subject matter jurisdiction in this Court. The decisions below involved exclusively state law questions concerning standing to intervene post-settlement, and the requirements to intervene under Pennsylvania Rules of Civil Procedure. Despite Petitioner's belated attempt to manufacture a federal question in the later stages of his appeal, no court in this case ever addressed or ruled on any federal question.

B. COUNTER-STATEMENT OF THE CASE

Petitioner Robert Sklaroff, M.D., ("Sklaroff") sought to intervene, post-settlement and without standing or legally enforceable interest, in the Commonwealth of Pennsylvania's lawsuit against the tobacco industry. Sklaroff's post-settlement Petition to Intervene presented a straightforward application of the Pennsylvania Rules of Civil Procedure governing non-party intervention, and the Pennsylvania case law applying those Rules. Accordingly, Sklaroff's post-settlement Petition to Intervene was denied by the Trial Court for lack of standing and lack of merit. That decision was affirmed, *en banc,* by the Commonwealth Court of Pennsylvania, which adopted the Trial Court's Opinion in its entirety. Subsequently, the Supreme Court of Pennsylvania denied Sklaroff's Petition for Review.

On November 23, 1998, the underlying litigation, i.e., *Commonwealth of Pennsylvania v. Philip Morris, et al.*, then-pending in the Court of Common Pleas of Philadelphia County, was settled among the parties. At that time, the Commonwealth of Pennsylvania, along with 45 States that had not previously settled tobacco litigation, entered into a historic Master Settlement Agreement (MSA) and a parallel Smokeless Tobacco Master Settlement Agreement (STMSA), settling the states' litigation against the tobacco industry. The settlement requires the tobacco industry to pay the settling states $206 billion over 25 years, and requires dramatic nationwide changes in the way the tobacco companies do business, which will reduce teenage smoking and result in the considerable savings of lives and reduction of tobacco-related disease.[1]

The settlement of the Commonwealth's underlying lawsuit provides that the tobacco defendants will pay the Commonwealth $11.26 billion over the next 25 years with additional potential payments in excess of $500 million per year into perpetuity thereafter -- easily the largest litigation recovery in Pennsylvania history. In addition, the settlement calls for sweeping injunctive relief designed to protect the citizens of Pennsylvania from the harms caused by tobacco use. This relief, which goes far beyond that which a court would have the power to grant, when coupled with the public health, youth smoking cessation, and medical research programs contemplated by the settlement, will by all accounts produce significant results in the savings of lives and reduction of disease for millions of Pennsylvanians. In short, the

---

[1] All trial and appellate courts which have reviewed and considered the *identical* MSA in the 46 States where similar State tobacco cases were pending, have *unanimously* approved the MSA or affirmed its approval by the trial judge. No petition to intervene to block the settlement has been granted by any court at any level.

settlement is potentially the most beneficial litigation resolution in Pennsylvania history.

Nevertheless, following the announcement of the settlement and without legal basis or standing, Sklaroff, who in his prior Briefs has proclaimed himself to be the "last anti-smoking activist who remains erect in America", filed a petition to intervene in the Commonwealth's litigation for the stated purpose of defeating the MSA, simply because *he*, a stranger to the litigation, wanted to change it.[2]

The trial court (Judge John Herron of the Court of Common Pleas of Philadelphia County), by Order dated January 13, 1999, properly denied Sklaroff's Petition to Intervene, concluding that (1) Sklaroff has no standing to intervene, post-settlement, in the Commonwealth's litigation, (2) Sklaroff could not satisfy any of the requisites for intervention as set forth in Pa. R.C.P. 2327 and 2329, and (3) the post-settlement intervention would be unduly prejudicial to the parties and to the resolution of their lawsuit (Pa. R.C.P. 2329). The Commonwealth Court of Pennsylvania affirmed *en banc*, adopting the trial Court's Opinion in its entirety, and denied Sklaroff's Petition for Reconsideration. The Supreme Court of Pennsylvania thereafter denied Sklaroff's Petition for Review.

---

[2] Sklaroff has previously been sanctioned for proceeding with frivolous litigation at both the trial and appellate levels. *See Robert B. Sklaroff M.D. v. Allegheny Health Education Research Foundation, et al.*, 1996 W.L. 665519 (E.D. Pa. Nov. 12, 1996), *aff'd without opinion*, 118 F.3d 1578 (3d Cir. 1997), sanctioning Sklaroff in the amount of $146,393.24 in attorneys' fees and costs for bringing and proceeding with "frivolous" litigation in the trial court, and 1998 W.L. 47376 (E.D.Pa.), Memorandum Opinion of February 3, 1998 sanctioning Sklaroff in the amount of $31,311.85 for proceeding with a "frivolous" appeal in the Third Circuit Court of Appeals.

C. REASONS TO DENY THE PETITION

Sklaroff's Petition for Writ of Certiorari should be dismissed or denied because:

- Pennsylvania Courts have decided this case on adequate and independent state grounds, apart from any frivolous theoretical federal issue that the Petitioner is now trying to concoct (without delineation, authority or support), and therefore this Court has no jurisdiction to hear this case (*see Michigan v. Long*, 463 U.S. 1032 (1983));

- The Petition is moot under Pennsylvania law, since putative intervenor Sklaroff is seeking to intervene in the underlying action that was dismissed with prejudice by the trial court's Order dated January 13, 1999 (Sklaroff did not appeal from the dismissal). Accordingly, under well-settled Pennsylvania law and procedure, there is no pending case or controversy in which to intervene (*Richards v. Trimbur*, 374 Pa. Super. 352, 543 A.2d 116 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989));

- The Petition for Review does not present an issue warranting discretionary review by this Court because, as found after full consideration and review by the Pennsylvania trial and appellate courts:

  a. Sklaroff's post-settlement petition to intervene in the underlying litigation is without legal basis or merit; and

b. The trial Court properly applied Pennsylvania rules and law governing non-party intervention.

- Sklaroff does not even attempt to advance any appropriate reason why this Court should grant review, such as conflicts with decisions of this Court or of Federal Courts of Appeals, or conflicts with Courts of last resort in other states on any federal question, and does not identify any federal question decided or addressed below.

1. The Case Was Decided On Adequate and Independent State Grounds, and This Court Therefore Has No Jurisdiction to Hear the Case

It is well-settled that this Court does not have jurisdiction to hear an appeal from a state Supreme Court that was decided on state law grounds, as this case was. Even if the state courts had addressed a federal issue (which they did not, because none was raised), this Court will not review a decision if it could be supported on the state law grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). This case was decided strictly on the grounds of Pennsylvania procedure as to non-party standing and adequate basis to intervene. There are no federal issues to review.

2. The Petition for Writ of Certiorari Should Be Dismissed as Moot Because There No Longer Is any Case or Controversy in Which to Intervene

On January 13, 1999, at the request of all parties, Hon.

John W. Herron of the Court of Common Pleas of Philadelphia County issued an Order dismissing all claims with prejudice as part of the settlement approval. As there is no case in which to intervene, the instant Petition for Writ of Certiorari should be dismissed as moot.

Once the trial court approved the settlement and entered an order dismissing the litigation with prejudice, there was no longer any actual case or controversy into which Sklaroff could intervene. A court should dismiss a case as moot at any stage, including on appeal, unless an actual case or controversy exists at all stages of the judicial or administrative process. *DeFunis v. Odegaard*, 416 U.S. 312 (1973); *Cytemp Specialty Steel Div., Cyclops Corp. v. Pennsylvania Public Utility Comm'n*, 128 Pa. Commw. 349, 563 A.2d 593, 596 (1989); *Richards v. Trimbur*, 374 Pa. Super. 352, 543 A.2d 116 (1988), *appeal denied*, 522 Pa. 620, 563 A.2d 888 (1989).

This requirement applies to appeals from denials of intervention petitions just as to any other appeal. *See Richards*, 374 Pa. Super. at 359, 543 A.2d at 119 (quashing appeal from denial of intervention after case was voluntarily dismissed). "An intervenor must take the litigation as he finds it," and an appeal from a denial of intervention will be dismissed as moot where the underlying litigation has been terminated. *Pennsylvania Coal Mining Assoc. v. Commonwealth of Pennsylvania*, 498 Pa. 1, 4, 444 A.2d 637, 638 (1982).

3. As Found After Full Review by the Pennsylvania Appellate Courts, Petitioner Asserts No Basis To Question the Sound Discretion of the Trial Court

Even if this Court had jurisdiction to review a state law decision of a state court, Sklaroff has not and cannot satisfy

any criteria for warranting further appellate review of his petition for post-settlement intervention. As any objective reading of the trial court's Opinion reflects, the trial court did not abuse its discretion in denying Sklaroff's post-settlement petition to intervene in the Commonwealth's litigation.[3] The Commonwealth Court, *en banc*, not only affirmed the trial court, but adopted the trial court's Opinion in its entirety.

Sklaroff's Petition fails to address the fundamental finding that Sklaroff did not have standing to intervene under Pa. R.C.P. 2327-2329 in the Commonwealth's settlement of its lawsuit. Sklaroff did not satisfy any of the prerequisites for intervention under those governing rules, including showing any "legally enforceable interest" that would be affected by the litigation, or showing that the post-settlement intervention would not be unduly prejudicial to the parties and to the resolution of their litigation -- a separate basis to deny intervention pursuant to Rule 2329.

These prerequisites for intervention were each discussed at length in the trial court's Opinion, attached as Appendix A to the Petition for Writ of Certiorari, with citations to numerous cases, to wit: the lack of ripeness (Appendix A, at 18-19, 35-37); the purely hypothetical and conjectural nature of the harm alleged (Appendix A, at 28-32); the resulting prejudice to the parties and to the resolution of the litigation (Appendix A, at 41-44); the conclusion that Sklaroff was seeking an improper advisory opinion (Appendix A, at 32), and the conclusion that the relief sought raised a non-justiciable

---

[3] *See Pennsylvania Association of Rural and Small Schools v. Casey*, 31 Pa. 439, 442 n.3, 613 A.2d, 1198, 1200 n.3 (1992) ("a trial court will not be found to have abused its discretion [in denying intervention] *unless the record discloses that the judgment exercised was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will")* (citations omitted, emphasis added).

political question (Appendix A, at 38-40). That decision is reviewable only under an abuse of discretion standard.

Sklaroff has never made any pretense of satisfying the requisites for intervention set forth in the Pennsylvania Rules of Civil Procedure and has never provided any basis for challenging the trial court's exercise of discretion, let alone showing any basis for establishing an abuse of that discretion. Sklaroff simply continues to rail against the merits of the MSA. Nor has he even attempted to satisfy (or even identify) any of the articulated considerations in Supreme Court Rule 10 for granting a Writ of Certiorari.

4. The Petition Contains Numerous Misstatements of the Tobacco Settlement and the Course of This Appeal

As he has done at every level, Sklaroff, the self-proclaimed "last anti-tobacco activist who remains erect in America" continues to misstate the terms of the MSA, the course of his appeal, and a variety of extraneous matters. He asserts, for example, that the Commonwealth did not dispute his interpretation of the MSA, including claims such as that the MSA settles future claims of minors. These assertions are irresponsible and inaccurate.

In the interest of brevity, we will not respond to Sklaroff's numerous misstatements, except to note that each of the 46 presiding judges (in each of the 46 settling States), that reviewed and considered the identical MSA, has ***unanimously approved it***, and that every appellate court that has reviewed that approval, has affirmed.

D. CONCLUSION

For the reasons set forth herein, the Commonwealth of Pennsylvania, respectfully urges this Court to deny the petition for Writ of Certiorari.

Respectfully submitted,

D. Michael Fisher, Attorney General
COMMONWEALTH OF PENNSYLVANIA
Joel M. Ressler, PA ID # 28625
Senior Deputy Attorney General
Louis J. Rovelli, PA ID # 19568
Executive Deputy Attorney General,
Director, Civil Law Division
Office of Attorney General, 16th Floor
Strawberry Square, Harrisburg, PA 17120
(717) 783-1794

DUANE, MORRIS & HECKSCHER LLP
Reeder R. Fox, PA ID # 04701
(Counsel of Record)
Mark Lipowicz, PA ID #20716
Frank E. Noyes, II, PA ID # 48366
One Liberty Place
Philadelphia, PA 19103
(215) 979-1000

BUCHANAN INGERSOLL PROFESSIONAL CORPORATION
Thomas L. VanKirk, PA ID # 01583
Stanley Yorsz, PA ID # 28979
One Oxford Centre - 20th Floor
Pittsburgh, PA 15219-1410
(412) 562-8800